

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

AARON JAMES WIELAND,

Defendant-Appellee.

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UNPUBLISHED

March 27, 2007

No. 265799

Saginaw Circuit Court

LC No. 05-026271-FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EDWARD JOHN MESMAN, JR.,

Defendant-Appellee.

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No. 265800

Saginaw Circuit Court

LC No. 05-026272-FC

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the circuit court's order granting defendants' motion in limine to exclude evidence of an out-of-state scheme. Defendants are facing nine felony charges stemming from a robbery and murder committed in November 2004. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Defendants allegedly conspired to commit the robbery and murder of a car dealer in Fort Wayne, Indiana. When that plan failed because the potential victim failed to appear as expected at the dealership, defendants came to Michigan where they allegedly conspired to rob a family in Saginaw Township. Defendants are charged in separate cases with crimes attendant to the murder of Huy Cao Nguyen, a member of that Michigan family. In the circuit court, defendants moved to exclude admission of any evidence related to the alleged out-of-state scheme. Defendants argued that any alleged conspiracy to commit a robbery and homicide in Indiana ended when the intended victim failed to appear, and that because the alleged conspiracy to commit criminal acts in Michigan was separate and distinct from the prior alleged conspiracy, evidence related to the out-of-state scheme was irrelevant and unfairly prejudicial. The

prosecution argued that there was only one, continuous conspiracy with an ending intended location and intended victim. The circuit court granted defendants' motion to exclude any evidence related to their out-of-state scheme. Plaintiff filed an emergency application for leave to appeal with this Court, along with motions for immediate consideration and a stay of trial court proceedings. This Court granted the motions and consolidated both cases.<sup>1</sup>

Plaintiff argues that the circuit court erred in concluding that evidence concerning defendants' attempt to rob and murder the car dealer in Indiana was both irrelevant to the charges brought against them in Michigan and unfairly prejudicial, and that the evidence is relevant because it is part of a continuing conspiracy to rob victims for money and cars and murder any witnesses, it completes the story the jurors will hear, and it bears on defendants' motive and premeditation in killing Huy. We agree in part. "The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, a trial court's decision as to whether multiple or single conspiracies exists is factual in nature, and, therefore, is reviewed for clear error. *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999).

A criminal conspiracy is a partnership of two or more individuals that "have voluntarily agreed to effectuate the commission of a criminal offense." *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The individuals must have specifically intended to combine to further, promote, or advance an unlawful objective because the essence of the crime of conspiracy is the unlawful agreement itself. *Id.* at 345-347. The unlawful agreement is defined by the scope of the commitment of the conspirators. *Id.* at 347-348. Conspiracies have a temporal dimension and continue until they are completed, abandoned, or terminated. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). "An arrest generally terminates the conspiracy, as does the success or failure of its objectives." *Id.*

In Michigan, the distinction between single and multiple conspiracies has been addressed in cases involving the application of principles of double jeopardy.<sup>2</sup> *People v Mezy*, 453 Mich 269, 277 (Weaver, J.), 286 (Brickley, C.J.); 551 NW2d 389 (1996); see also *People v Wilson*, 454 Mich 421, 427-435 (Brickley, J.), 440-459 (Boyle, J.); 563 NW2d 44 (1997). In determining the extent of the agreements at issue therein, *Mezy* used a totality of the circumstances test that looked to the following factors:

1) time, 2) persons acting as coconspirators, 3) the statutory offenses charged in the indictments, 4) the overt act charged by the government or any other description of the offenses charged that indicates the nature and scope of the activity that the government sought to punish in each case, and 5) places where the events alleged as part of the conspiracy took place. [*Mezy, supra* at 285, citing *United States v Thomas*, 759 F2d 659, 661-662 (CA 8, 1985).]

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<sup>1</sup> *People v Wieland*, unpublished order of the Court of Appeals, entered October 17, 2005 (Docket No. 265799); *People v Mesman*, unpublished order of the Court of Appeals, entered October 17, 2005 (Docket No. 265800).

<sup>2</sup> US Const, Am V; Const 1963, art 1, § 15.

*Mezy* went on to state that “[t]he essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement each with a separate object.” *Id.*

The trial court did not clearly err in determining that the evidence of record indicates that there were two distinct agreements with separate objects in this case. According to the testimony offered at the preliminary examination, after discussing their plan for approximately a week, defendants left Kentucky and went to Indiana in order to rob a car dealer and kill him. There is no indication that this alleged initial planning included any other crimes or broader schemes. Rather, the testimony was that it was only after this initial plan to rob and kill the car dealer was abandoned that defendant Wieland suggested he knew another family in Michigan that they could try to rob instead. See *Bushard, supra* at 394. The evidence adduced below is that defendants then decided to head to Michigan and planned the Saginaw robbery on the way. Taken together, these facts can be read to indicate separate conspiracies to commit similar crimes rather than an ongoing conspiracy with individual sub-schemes.

Plaintiff also asserts the proffered evidence was nevertheless relevant because it formed part of the *res gestae* of the charged crimes.

““It is elementary that the acts, conduct and demeanor of a person charged with a crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as a part of the *res gestae*. Proof of such acts is not rendered inadmissible by the fact that they may tend to show the commission of another crime.”” [*People v Smith*, 119 Mich App 431, 436; 326 NW2d 533 (1982).<sup>3</sup>]

Stated differently, evidence of other acts is admissible ““when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.”” *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P 2d 245 (1964).

We conclude that the facts pertaining to the alleged conspiracy and attempted robbery in Indiana are not so blended with the crimes defendants have been charged with here, that proof of the alleged Indiana conspiracy incidentally involves the alleged crimes here in Michigan. The evidence is that the alleged agreement and plans to commit the robbery in Saginaw Township were formed after the attempted robbery in Indiana failed; thus, the facts alleged to have occurred in Michigan are not generally blended with those alleged to have occurred in Indiana. Further, while the prosecution may seek to introduce some facts that occurred in Indiana while defendants were still intending to commit a robbery there, these facts can be brought into evidence without having to reference defendants’ specific plans with regard to the car dealer.

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<sup>3</sup> Quoting *People v Stoker*, 103 Mich App 800, 807; 303 NW2d 900 (1981), quoting *People v Scott*, 61 Mich App 91, 95; 232 NW2d 315 (1975), quoting *People v Savage*, 225 Mich 84, 86; 195 NW 669 (1923).

Plaintiff next contends that the alleged attempted robbery in Indiana is relevant because it establishes premeditation and defendants' motive in committing the crimes in Michigan. We agree. Evidence of defendants' failed Indiana scheme, including defendants' general intent to commit a robbery in Indiana, the ultimate failure of the plan, and their decision to head to Saginaw Township instead of returning to Kentucky, gives context to the apparent motive in this case which was to obtain money from the Nguyen family, and also tends to show premeditation, in light of the distance traveled from Indiana and defendant's state of mind after the failed robbery. However, the defendants' alleged failed attempt to dig a grave for the Indiana car dealer is not relevant because that incident does not make any facts of consequence to the charges for the Saginaw crimes more or less probable than they would be without the evidence. *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

Finally, plaintiff asserts that the trial court abused its discretion in concluding that even if the evidence of the Indiana scheme is relevant to a fact in issue, any probative value is outweighed by the danger of unfair prejudice under MRE 403. We disagree. "[MRE] 403 does not prohibit prejudicial evidence, only evidence that is unfairly so. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Lewis v Legrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003), quoting *Waknin v Chamberlain*, 467 Mich 329, 334 n 3; 653 NW2d 176 (2002). As discussed above, we conclude that evidence of the Indiana scheme as it bears on motive and premeditation concerning the Michigan crimes is relevant. Because the evidence is more than marginally probative, it will not be given undue or preemptive weight by a properly instructed jury.

We affirm that portion of the trial court's ruling, which excluded evidence of defendants' alleged failed attempt to dig a grave for the Indiana car dealer. We reverse the trial court's decision excluding the remaining evidence related to defendant's failed attempt to rob the Indiana car dealer, on the basis that this evidence is relevant to motive and premeditation concerning the Saginaw crimes, and further because this evidence is not outweighed by the danger of unfair prejudice. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder